

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

affidavit
77-6104

To be argued by
KENT T. STAUFFER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6104

ALFRED KIRSHNER,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA, SECRETARY OF THE
TREASURY, COMMISSIONER OF I.R.S., ALVIN D. LURIE,
in his capacity as Assistant Commissioner, Employer,
and Exempt Organizations, I.R.S., BERNARD GOLDBERG,
REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRIST-
TEN, VICTOR CONDELLO, HARRISON J. GOLDIN, JAMES
REGAN, individually and as Trustees of the Teachers Retirement
System of the City of New York, and ISALAH ROBINSON

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANTS-APPELLEES UNITED STATES
OF AMERICA, SECRETARY OF THE TREASURY,
COMMISSIONER OF I.R.S., AND ALVIN D. LURIE**

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TABLE OF CONTENTS

	PAGE
Issue Presented on Appeal	1
Statement of the Case	2
Statement of Facts	4
Relevant Statute	5
ARGUMENT:	
POINT I—The District Court Properly Determined That Plaintiff Lacks Standing to Assert His Claims against the Federal Defendants	9
POINT II—The District Court Properly Held That P.L. 94-236 Is Constitutional	15
CONCLUSION	21

TABLE OF CASES

<i>American Society of Travel Agents, Inc. v. Blumenthal</i> , Dkt. No. 75-1782 (D.C. Cir., Sept. 15, 1977) ..	10
<i>Bowker v. Morton</i> , 541 F.2d 1347 (9th Cir. 1976) ..	10
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977)	14n
<i>Christian Echoes National Ministry, Inc. v. United States</i> , 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973)	17
<i>City of Hartford v. Town of Glastonbury</i> , Dkt. No. 76-6049 (2d Cir., Aug. 15, 1977)	10
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	18

	PAGE
<i>DuPont Glore Forgan, Inc. v. American Telephone and Telegraph Co.</i> , 428 F. Supp. 1297 (S.D.N.Y. 1977), appeal docketed, Dkt. No. 77-6148 (2d Cir.)	14-15n
<i>Evans v. Lynn</i> , 537 F.2d 571 (2d Cir. 1976), cert. denied sub nom. <i>Evans v. Hills</i> , 429 U.S. 1066 (1977)	10
<i>F. S. Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920)	17
<i>First National Bank in Dallas v. United States</i> , 420 F.2d 725 (Ct. Cl.), cert. denied, 398 U.S. 950 (1970)	16
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	9
<i>Flora v. United States</i> , 362 U.S. 145 (1960)	15n
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	17
<i>Jackson v. Statler Foundation</i> , 496 F.2d 623 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975)	10n
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944) ..	17
<i>Linda R. S. v. Richard D.</i> , 410 U.S. 614 (1973)	9
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	17
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	17
<i>McLaughlin v. Florida</i> , 379 U.S. 184 (1964)	17
<i>Ohio Oil Co. v. Conway</i> , 281 U.S. 146 (1930)	17
<i>Oyama v. California</i> , 332 U.S. 633 (1948)	17
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	17
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	17

	PAGE
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976)	10, 11, 12, 13, 14n
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976)	9n
<i>United Public Workers of America v. Mitchell</i> , 330 U.S. 75 (1947)	10
<i>United States v. Hudson</i> , 299 U.S. 498 (1937)	16
<i>United States v. Oates</i> , Dkt. No. 76-1100 (2d Cir., June 3, 1977)	19
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	9, 10, 13
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	17

TABLE OF AUTHORITIES

Constitution, Art. I, § 10	2, 3
Constitution, Art. III	9, 12, 14n
Constitution, First Amendment	17
Constitution, Fifth Amendment	2, 3
Constitution, Fourteenth Amendment	2
5 U.S.C. §§ 701 <i>et seq.</i>	14n
5 U.S.C. §§ 401 <i>et seq.</i>	5, 12
26 U.S.C. § 401	3, 4, 5
26 U.S.C. § 503	3, 4, 5
26 U.S.C. § 7421	14n
28 U.S.C. § 2201	14n
31 U.S.C. §§ 1501 <i>et seq.</i> (Supp. V, 1975)	18
31 U.S.C. § 1501 (Supp. V, 1975)	18, 20
Public Law 94-236, 90 Stat. 238	<i>passim</i>

	PAGE
N. Y. Education Law, § 2575 (McKinney 1976-77 Supp.)	16n
Hearings on H.R. 11700 before the House Committee on Ways and Means, 94th Cong., 2d Sess. (1976) 18, 19, 20	
121 Cong. Rec. S21,308-S21,310 (daily ed. Dec. 5, 1975)	4n
122 Cong. Rec. H1396-H1398 (daily ed. Mar. 1, 1976)	19
122 Cong. Rec. S2796 (daily ed. Mar. 4, 1976)	19
Rev. Rul. 69-494, 1969-2 Cum. Bull. 88	5

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**BRIEF FOR DEFENDANTS-APPELLEES UNITED STATES
OF AMERICA, SECRETARY OF THE TREASURY,
COMMISSIONER OF I.R.S., AND ALVIN D. LURIE**

Issue Presented on Appeal

Did the District Court err in granting the motion of
defendants-appellees United States of America, Secretary
of the Treasury, Commissioner of I.R.S., and Alvin D.
Lurie (collectively, the "Federal Defendants") dismiss-
ing the complaint in this action as against them for
lack of jurisdiction and failure to state a claim upon
which relief can be granted?

Statement of the Case

Plaintiff-appellant Alfred Kirshner ("plaintiff") appeals from a memorandum and order of the Honorable Lawrence W. Pierce, United States District Judge, dated June 13, 1977, and filed in the United States District Court for the Southern District of New York on June 15, 1977, dismissing the complaint in its entirety (App., Exh. A).* This appeal was timely filed on June 28, 1977.

This action was commenced by the filing of the complaint and the issuance of summonses on February 10, 1977 (App., p. i). By this action, the plaintiff essentially sought a judicial reversal of the events and legislative actions culminating in the purchase of obligations of the Municipal Assistance Corporation ("MAC") by the Teachers Retirement System of the City of New York. He joined as parties defendant the Federal Defendants and the Trustees of the Teachers Retirement System (the "Trustees").

With respect to the Trustees, he alleged violations of the federal securities laws, denial of plaintiff's constitutional rights under the Fifth and Fourteenth Amendments as well as Article I, section 10, of the Constitution (*E.g.*, App., Exh. B, p. 2). He also charged that the Trustees had breached their fiduciary duty to the plaintiff as beneficiary of the Teachers Retirement System (*E.g.*, App., Exh. B, p. 3). For relief, he sought an injunction barring further purchases by the Trustees of New York City obligations and an order directing the sale of City and Municipal Assistance Corporation obligations already purchased (App., Exh. B, p. 16).

* "App." refers to documents and pages in the "Appendix for Plaintiff-Appellant".

As against the Federal Defendants, the plaintiff claimed that (1) the actions of defendant Lurie, in approving by letters dated December 5 and 13, 1975,* purchases of New York City obligations as not violating 26 U.S.C. §§ 401 and 503, were arbitrary and violated plaintiff's constitutional rights to due process and equal protection (App., Exh. B, pp. 7-8); and (2) the passage by Congress of the Act of March 19, 1976, P. L. 94-236, 90 Stat. 238, also violated plaintiff's rights under the Fifth Amendment, as well as Article I, section 10, of the Constitution (App., Exh. B, pp. 14-15). The plaintiff sought an order declaring P. L. 94-236 unconstitutional and enjoining its enforcement (App., Exh. B, p. 16).

The Federal Defendants and the Trustees moved separately to dismiss the complaint. On June 13, 1977, the District Court granted the motions of the defendants and dismissed the complaint (App., Exh. A).

With respect to the Federal Defendants, the District Court held that the plaintiff lacked standing to invoke the jurisdiction of the court. Moreover, even if the plaintiff were deemed to have standing to raise his claims, the District Court held that, in any event, P. L. 94-236 was constitutional under the Fifth Amendment.

* The Federal Defendants deny that such approval was ever given by defendant Lurie. However, for purposes of the motion to dismiss, these allegations were deemed true. Whether such approval was in fact given is immaterial in view of the passage of P. L. 94-236, which exempted purchases pursuant to the New York City Agreement of November 26, 1975, from the requirements of 26 U.S.C. §§ 401 and 503. The statute thus mooted any issue that might otherwise have arisen concerning the administrative actions of the Internal Revenue Service and, in particular, the letters of December 5 and 13, 1975.

Statement of Facts

The plaintiff is a former teacher in the New York City school system, having retired in February, 1953. Since that time, as a retired member of the Teachers Retirement System of the City of New York, he has been receiving a monthly retirement allowance amounting to approximately \$3,000.00 per year (App., Exh. B, pp. 2-3).

The federal statute challenged by plaintiff is applicable by its terms only to the five municipal pension funds, including the Teachers Retirement System, which were party to the New York City Agreement dated November 26, 1975 (the "Agreement").* Under that Agreement, the five municipal pension funds agreed to purchase New York City bonds in the principal amount of approximately \$2.5 billion through fiscal 1978 on a scheduled basis. The funds agreed to purchase, prior to January 1, 1976, \$30 million of City bonds carrying an interest rate of 6 percent per year. The remaining purchases of City obligations were to bear a 9 percent interest rate. Agreement, ¶ 7 ("Appendix Exhibits," Exh. I).

Public Law 94-236 provides essentially that the five municipal pension funds which were party to the New York City Agreement will not, by their purchasing obligations of the City pursuant to the Agreement, be deemed to have violated sections 401(a) and 503(b) of the Internal Revenue Code, 26 U.S.C. §§ 401(a) and 503(b).

Under those Internal Revenue Code provisions, a governmental pension plan will lose its tax exempt qualified status if it engages in the prohibited transactions enumerated in section 503(b). These prohibited transactions

* The text of the New York City Agreement was set forth in 121 Cong. Rec. S21,308-S21,310 (daily ed. Dec. 5, 1975); a copy of the Congressional Record excerpt has been included as Exhibit I in plaintiff's "Appendix Exhibits".

include (1) lending any trust assets to a substantial contributor without the receipt of adequate security and a reasonable rate of interest; (2) making any substantial purchase of securities or other property from a substantial contributor for more than adequate consideration; and (3) engaging in any other transaction which results in a substantial diversion of trust income or corpus to a substantial contributor. See 26 U.S.C. § 503(b).

In addition, all such qualified plans are required to be created or organized for the "exclusive benefit" of employees under section 401(a) of the Internal Revenue Code. This provision has been interpreted by the IRS to mean that assets may not be diverted for the benefit of the employer unless (1) the cost does not exceed fair market value at the time of purchase; (2) a fair return commensurate with the prevailing rate is provided; (3) sufficient liquidity is maintained so as to permit distributions in accordance with the terms of the plan; and (4) the safeguards and diversity that a prudent investor would adhere to are present. See Rev. Rul. 69-494, 1969-2 Cum. Bull. 88.

Thus, Congress has, by P. L. 94-236, created a specific legislative assurance that by choosing to participate in the Agreement the municipal pension funds, including the Teachers Retirement System, will not lose the tax exemption benefits of §§ 401 *et seq.* of the Internal Revenue Code.

Relevant Statute

Public Law 94-236, provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any pension plan or trust which, on December 5, 1975, was a party to the amended and re-

stated agreement of November 26, 1975, set forth on pages S21308, S21309, and S21310 of the Congressional Record published on such date, and any trust forming a part of such a plan, shall not be considered to fail to satisfy the requirements of section 401(a) of the Internal Revenue Code of 1954, and shall not be considered to have engaged in a prohibited transaction described in section 503(b) of such Code, merely because such plan or trust does any or all of the following:

(1) (A) enters into such agreement or agrees to an amendment of such agreement;

(B) forebears from any act prohibited by such agreement;

(C) acquires or holds any obligation the acquisition or holding of which is provided for by such agreement;

(D) makes any election provided for by such agreement;

(E) executes a waiver of any requirement of such agreement;

(F) after the expiration of such agreement, holds any obligation acquired or held pursuant to such agreement; or

(G) performs any other act provided for by such agreement;

(2) on or after August 20, 1975, and before January 1, 1979, considers, for purposes of determining investments to be made by the plan or trust, the extent to which such investments will—

(A) maintain the ability of the city of New York—

(i) to make future contributions to the plan or trust, and

(ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan or trust, and

(B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust; or

(3) after December 31, 1978, considers, for purposes of determining whether to retain investments held on December 31, 1978, the factors enumerated in paragraph (2).

For purposes of paragraph (1), the acquisition or holding of any obligation of the Municipal Assistance Corporation for the city of New York on or after August 20, 1975, and before November 26, 1975, shall be considered an acquisition or holding provided for by such agreement.

“(b) In the case of—

(1) any amendment to the agreement described in subsection (a) which relates to the application of the factors set forth in subsection (a) to the requirements of section 401(a) or 503(b) of the Internal Revenue Code of 1954 and which is adopted after December 5, 1975, and

(2) any waiver of any requirement of the agreement by a plan or trust after December 5, 1975,

such amendment or waiver shall take effect for purposes of subsection (a) on the date on which a copy of such amendment or waiver is submitted directly to the Secretary of the Treasury; except that, if the Secretary determines, not later than 30 days after such date of submission (or, if later, the date of the enactment of this Act) that the taking effect of such amendment or waiver

for purposes of subsection (a) is inconsistent with the considerations set forth in subsection (a) (2), such amendment or waiver shall not be deemed to have been effective for any period for purposes of subsection (a). No amendment to the agreement which has the effect of extending the expiration date of the agreement to a date later than December 31, 1978, shall take effect for purposes of subsection (a).

“(c) The trustees of each pension plan or trust described in subsection (a) shall furnish a copy of the annual report filed by such plan or trust with the New York State Insurance Department for each fiscal year of the plan or trust beginning after June 30, 1975, and ending with the first fiscal year in which there are no obligations with respect to which subsection (a) applies, to the Secretary of the Treasury not later than 30 days after the date such report is filed with the New York State Insurance Department, and shall furnish such additional reports and other information as the Secretary of the Treasury may reasonably require. A copy of each such report shall be furnished by the Secretary of the Treasury to the chairman of the Committee on Ways and Means of the House of Representatives and the chairman of the Committee on Finance of the Senate.

“(d) The Secretary of the Treasury or his delegate is authorized to prescribe such regulations as may be necessary to carry out the purposes of this Act.

“(e) This Act shall be effective on and after August 20, 1975.”

ARGUMENT

POINT I

The District Court Properly Determined That Plaintiff Lacks Standing to Assert His Claims against the Federal Defendants.

Federal court jurisdiction extends only to the adjudication of actual cases and controversies. U.S. Const., Art. III, § 2. See *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). Thus, standing

"is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Worth v. Seldin*, 422 U.S. 490, 498-99 (1975) (emphasis original).

In its recent rulings on this question, the Supreme Court has required that plaintiffs "allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (footnote omitted).^{*} The plaintiff cannot rely

^{*} An additional requirement has been framed, in appropriate cases, in terms of an inquiry into "whether a person with Art. III standing is asserting an interest arguably within the zone of interests intended to be protected by the constitutional or statutory provision on which he relies, . . . or whether a person should be allowed to attack a statute not on the ground that it is unconstitutional as applied to him, but that it would be unconstitutional as applied to third parties . . ." *Singleton v. Wulff*, 428 U.S. 106, 123 n. 2 (1976) (Powell, J., concurring in part).

"on the legal rights or interests of third parties" in establishing the validity of his own claim for relief, *Warth v. Seldin*, *supra*, 422 U.S. at 499, but must assert "a 'concrete injury' actually suffered by the particular plaintiff, or else clearly imminent, which is capable of resolution and redress in the federal courts." *Evans v. Lynn*, 537 F.2d 571, 591 (2d Cir. 1976) (*en banc*), *cert. denied sub. nom. Evans v. Hills*, 429 U.S. 1066 (1977) (footnotes omitted); *American Society of Travel Agents, Inc. v. Blumenthal*, Dkt. No. 75-1782 (D.C. Cir., Sept. 15, 1977); *City of Hartford v. Town of Glastonbury*, Dkt. No. 76-6049, slip op. 5281, 5286 (2d Cir., Aug. 15, 1977) (*en banc*); *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976). This injury must have resulted from the actions of the defendant, *Warth v. Seldin*, *supra*, 422 U.S. at 504. Furthermore, "unadorned speculation" as to the sustaining of an injury is insufficient to confer jurisdiction on this Court. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). This requirement of a concrete injury is particularly important where a litigant asks a court to pass upon the constitutionality of an act of Congress. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1947).

Simon v. Eastern Kentucky Welfare Rights Organization, *supra*, a case similar to the present action, demonstrates that plaintiff here does not have standing to pursue his claims against the Federal Defendants.* *Eastern Kentucky* was brought by a group of individuals and several organizations composed of indigent persons

* But see *Jackson v. Statler Foundation*, 496 F. 2d 623, 626 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (dictum). Whatever the continuing vitality of this dictum in *Jackson* in light of the more recent Supreme Court decision in *Eastern Kentucky* and the *en banc* decision of this Court in *City of Hartford*, it is submitted that *Eastern Kentucky* and *City of Hartford* are clearly controlling in this case.

who had allegedly been refused admission or treatment by several hospitals which had been granted tax-exempt status as charitable corporations by the Commissioner of Internal Revenue. The individuals comprising the plaintiff organizations claimed to be the intended beneficiaries of the Internal Revenue Code provisions granting tax benefits to charitable organizations and alleged that the Commissioner had "encouraged" the hospitals to deny them services by according the hospitals favorable tax treatment. *Id.*, 426 U.S. at 33. The plaintiffs sought declaratory and injunctive relief, including a prayer that defendants be directed "to suspend charitable organization treatment of and to refrain from extending such treatment to, any hospital that failed to submit proof . . . that it served indigents. . . ." *Id.*, 426 U.S. at 34 n. 10. The Supreme Court held that the plaintiffs lacked standing, stating, "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS'] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.*, 426 U.S. at 42-43.

In the present case, the plaintiff has not alleged a sufficient basis for standing, and his situation is virtually indistinguishable from that of the plaintiffs in *Eastern Kentucky*. First and foremost, the plaintiff here has not suffered any injury. He clearly states that he retired in February 1953, and, "[s]ince then he has been receiving a monthly retirement allowance from 'TRS'." (App., Exh. B, pp. 2-3). The amount of his annual allowance is approximately \$3,000.00 (*id.*), and the plaintiff makes no allegation of any sort that he has failed to receive any payment that has been due him. His primary claim is rather that the Trustees of the Teachers Retirement System have entered into transactions that may have been less attractive than alternative investment possibilities.

Even if the plaintiff had suffered "the concrete injury required by Art. III," *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 40, there is no basis in the record for asserting that such injury was caused by the actions of the Federal Defendants. The statute of which the plaintiff complains, P. L. 94-236, compels no actions at all by the Teachers Retirement System. It merely provides that, if the Trustees, in their discretion, undertake a specified investment, the pension fund will not lose the tax exemption benefits of §§ 401 *et seq.* of the Internal Revenue Code. The Trustees have been and are nevertheless free to invest as they see fit.

Plaintiff suggests that, but for P. L. 94-236, the extensive commitment in City bonds would not have been made by the Teachers Retirement System. But this suggestion is belied by plaintiff's pleadings. The complaint demonstrates that even before the Federal Defendants committed the allegedly illegal acts beginning in December, 1975, the Teachers Retirement System, in response to New York's looming financial crisis, had acquired substantial City and MAC bond holding worth approximately \$300 million (App., Exh. B, p. 15). Furthermore, plaintiff alleges in his complaint that the System's Trustees have been determined since 1975 to take whatever action has been needed to prevent New York City from falling into bankruptcy (*E.g.*, App., Exh. B, pp. 4-5). The logical conclusion from plaintiff's papers is that, with or without the alleged federal rulings and legislation complained of, the Trustees would have made the same type of financial commitments as those now challenged to help alleviate the City's financial distress. This conclusion is buttressed by the fact that under the Agreement that is at the root of plaintiff's complaint, the Trustees made a substantial commitment to purchase MAC bonds regardless of whether the federal ruling or legislation was obtained.

See Agreement ¶ 7(f)* ("Appendix Exhibits," Exh. I). In short, the System's heavy investment in City securities (and plaintiff's claimed injury) cannot be said to result from the allegedly illegal acts of the Federal Defendants. The Trustees' firm commitment to aid the City in the face of impending bankruptcy preceded the enactment of the federal legislation. The plaintiff thus relies "on little more than the remote possibility, unsubstantiated by allegations of fact, that [his] situation might have been better had [the Federal Defendants] acted otherwise, and might improve were the court to afford relief." *Warth v. Seldin*, *supra*, 422 U.S. at 507.

Finally, "the complaint suggests no substantial likelihood that victory in this suit would result" in plaintiff's receiving the redress of any injury he may have suffered. *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 45. The only possible action the Federal Defendants could take in implementing the relief plaintiff seeks would be to revoke the tax-exempt status of the pension fund. Far from redressing plaintiff's supposed injury, such a draconian solution would render the fund liable for federal taxes and impair its ability to meet its pension commitments. Furthermore, the revocation of the tax-exempt status of the Teachers Retirement System would not necessarily result in the pension fund's taking any other action with respect

* Paragraph 7(f) of the Agreement provides:

"If any of the Pension Funds elects not to make any purchases of bonds of the City as a result of a failure of any conditions set forth in clause (v), (vi) or (vii) of Paragraph 7(e), such Pension Fund shall nevertheless, as soon as possible but prior to June 30, 1976, purchase its proportionate share of \$500,000,000 of MAC Bonds pursuant to Paragraph 7(d) above provided that the President of the United States has announced publicly that he will support or not veto the Federal [seasonal financing] legislation referred to in Paragraph 6 above."

to the plaintiff's real complaint, the investment in City and MAC bonds by the pension fund. As already noted, even absent the federal legislation, the Trustees might well have entered into similar financial arrangements.

Thus, the complaint fails to present a justifiable case or controversy with respect to the Federal Defendants, and this action was properly dismissed by the District Court as against the Federal Defendants for plaintiff's lack of standing.*

* While the Federal Defendants urge that the standing issue is dispositive of this action with respect to them, it is submitted that, in any event, this Court lacks subject matter jurisdiction. See the discussion of the Government's jurisdiction arguments in *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 34-35, 37. As a third party to the taxing decision made by the IRS with respect to the Teachers Retirement System, the plaintiff cannot avail himself of the traditional means established by the Internal Revenue Code for challenging tax rulings, involving only suits by and against taxpayers themselves. Accordingly, the plaintiff relies on a variety of other jurisdictional claims to evade the sovereign immunity bar and to get his claim against the Federal Defendants before this Court.

The District Court rejected plaintiff's claim of jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* See also *Califano v. Sanders*, 430 U.S. 99 (1977). As noted earlier, see the footnote at p. 3, *supra*, this Court need not reach the question of jurisdiction under the Administrative Procedure Act since the standing argument advanced under Art. III of the Constitution is equally applicable to the Administrative Procedure Act, and, in any event, Congress, in P. L. 94-236, mandated the actions plaintiff claims the Internal Revenue Service took arbitrarily.

Congress has acted in situations like this to keep a suitor within the confines of the adjudicatory scheme of the Internal Revenue Code, *see, e.g.*, the Anti-Injunction Act, 26 U.S.C. § 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201. As Judge Weinfeld recently observed in a different context: "[T]he courts have repeatedly prevented any effort to circumvent, by whatever ingenious device, 'the harmony of our carefully

[Footnote continued on following page]

POINT II**The District Court Properly Held That P.L. 94-236 Is Constitutional.**

The District Court ruled that, even if the plaintiff were deemed to have standing, his challenge to the constitutionality of P. L. 94-236 must fail. Plaintiff's specific constitutional complaints appear to be that the passage of P. L. 94-236 has deprived him of property without due process of law and has denied him the equal protection of the laws (App., Exh. B, pp. 7-8, 14-16).

The principal objection to plaintiff's broad constitutional claims are that he has not been deprived of property, since his pension evidently continues unabated and unimpaired. Even if the plaintiff were to demonstrate some injury, some deprivation of property, it is quite difficult to trace its cause to the challenged statute. By P. L. 94-236, Congress worked absolutely no change in the value of the pension funds in the Teachers Retirement System. If anything, the assured continuation of the pension funds' tax-exempt status has enhanced the funds' value by not requiring the payment of Federal taxes.

Nevertheless, assuming, *arguendo*, the apparent premises of plaintiff's argument, namely (1) he has been deprived of property, and (2) the cause of that deprivation is P. L. 94-236, the validity of the statute must still be upheld against due process and equal protection attack. The plaintiff's complaints focus on the selective feature of the law, covering as it does only those pension funds that

structured twentieth century system of tax litigation.' " *DuPont Glore Forge Inc. v. American Telephone and Telegraph Co.*, 428 F. Supp. 1297, 1303 (S.D.N.Y. 1977), *appeal docketed*, Dkt. No. 77-6148 (2d Cir.) (quoting *Flora v. United States*, 362 U.S. 145, 176 (1960)).

were party to the Agreement, and the retroactivity of the law.*

Plaintiff's claim with respect to retroactivity is without basis. The effect of P. L. 94-236 is not to take property or to impair a right retroactively. Rather, it is to ratify a situation, the tax-exempt nature of the funds, which had continued *in statu quo* from the effective date of the law to the date of its passage. In short, the law changed nothing retroactively. In any event, retroactivity alone is not a sufficient basis for rendering an income tax statute unconstitutional, particularly where the period of retroactivity is as short as it is in this case, in which the period of retroactivity was within the then-current fiscal year of the Teachers Retirement System.** *United States v. Hudson*, 299 U.S. 498, 500-501 (1937); *First National Bank in Dallas v. United States*, 420 F.2d 725, 729-731 (Ct. Cl.), *cert. denied*, 398 U.S. 950 (1970).

Plaintiff's complaint concerning the legislative classification must also fail. Under due process and equal protection analysis, strict scrutiny of a legislative classi-

* The plaintiff also complains about the differing effects of P. L. 94-236 on retiree and non-retiree contributors to the pension funds. However, nothing on the face of P. L. 94-236 distinguishes between these groups. If, in fact, those two groups do receive different levels and types of benefits, it is not because of Congress' treatment of the pension funds but rather an inherent result of the legislative decisions made by the State of New York. See, e.g., N.Y. Education Law, § 2575 (McKinney 1976-77 Supp.).

** Public Law 94-236, approved March 19, 1976, has an effective date of August 20, 1975.

fication is required only when the classification impermissibly interferes with the exercise of a fundamental right, such as a right of a uniquely private nature, *Roe v. Wade*, 410 U.S. 113 (1973), the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), or First Amendment rights, *Williams v. Rhodes*, 393 U.S. 23 (1968), or when the classification operates to the peculiar disadvantage of a suspect class, such as a classification by race, *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964), alienage, *Graham v. Richardson*, 403 U.S. 365 (1971), or ancestry, *Oyama v. California*, 332 U.S. 633 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944).

In this case, neither a classification which extends tax exemption benefits to some pension funds and not to others, cf. *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849, 857-858 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973), nor a classification based on age or retirement status, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), can be said to constitute such an impermissible classification as to call for strict scrutiny of the action of Congress. In such a case as this, then,

“[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy.” *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

See also *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159-160 (1930).

The legislative history of P. L. 94-236 demonstrates that the object of the legislation has a "reasonable basis." See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Congress was reacting to a significant threat of the bankruptcy of New York City, which was perceived to be imminent. As a result of the impending insolvency of New York City, Congress passed the New York Seasonal Financing Act of 1975, P. L. 94-143, 31 U.S.C. §§ 1501 *et seq.* (Supp. V. 1975). That law authorized the Secretary of the Treasury to loan up to \$2.3 billion to the City of New York in order that the City might maintain its essential services. At that time, Congress made the following findings and declarations:

"(1) It is necessary for the city of New York to obtain seasonal financing from time to time because the city's revenues and expenditures, even when in balance on an annual basis, are not received and disbursed at equivalent rates throughout the year.

"(2) At the present time the city is or may be unable to obtain such seasonal financing from its customary sources.

"(3) It is necessary to assure such seasonal financing, in order that the city of New York may maintain essential governmental services." 31 U.S.C. § 1501 (Supp. V, 1975).

In hearings before the House Ways and Means Committee, Charles M. Walker, then Assistant Secretary of the Treasury for Tax Policy, made it clear that H. R. 11700, subsequently enacted as P. L. 94-236, was part and parcel of the overall program to render financial assistance to New York City (Hearings on H. R. 11700 before the House Committee on Ways and Means, 94th Cong., 2d Sess., at 3 (1976) ("Hearings")). This point was further emphasized by Senator Long, Chairman of the Senate Finance Committee, in the Senate debates on the bill:

"The legislation is an essential part of the plan worked out already; if it is not passed, then the banks are no longer bound to hold city notes, and the Federal loans we provided will not be sufficient to tide the city over. In other words, if this legislation is not passed, New York City will be immediately plunged into a financial crisis which we have already sought to forestall." 122 Cong. Rec. S2796 (daily ed. Mar. 4, 1976).

See also 122 Cong. Rec. H1396-H1398 (daily ed. Mar. 1, 1976) (remarks of Reps. Ullman, Rangel, and Conable). These comments, by the chairmen of the Senate Finance Committee and the House Ways and Means Committee, and by two additional members of the House Ways and Means Committee who had sponsored the legislation, see Hearings, at 1, "when expressed in the floor debates prior to passage of the legislation, are entitled to particular deference." *United States v. Oates*, Dkt. No. 76-1100, slip op. 6389, 6436 n. 26 (2d Cir., June 3, 1977).

With respect to the Teachers Retirement System, in the hearings before the House Ways and Means Committee, the testimony of Bernard Goldberg and the written statement of Reuben W. Mitchell, both trustees of the System, indicated that the interests of both present and future beneficiaries of the System would be endangered without passage of this legislation, because of the special circumstances existing with respect to New York City financial obligations (Hearings, at 42, 43).

This was further highlighted by the statement and testimony of Jack Bigel, pension consultant to the Municipal Labor Committee, concerning the impact of the then-proposed legislation. Mr. Bigel introduced actuarial calculations which showed that, if the city were to go bankrupt and the value of New York City and Municipal Assistance Corporation obligations were set at zero, the

five New York City pension funds which participated in the Agreement would incur a collective net annual deficit of \$730 million for the 1975-1976 fiscal year. At that rate, Mr. Bigel stated that the reserves of the various funds would be exhausted in seven to eight years (Hearings, at 32-33).

On the other hand, Mr. Bigel testified that, assuming scheduled investments in New York City and Municipal Assistance Corporation securities and the continued solvency of New York City, the asset value of the pension funds would increase by \$2.3 billion by the end of the 1977-1978 fiscal year (Hearings, at 33).

Clearly, Congress had ample basis to conclude that, far from being arbitrary, the provisions and effect of P. L. 94-236 were rational and necessary to accomplish the avowed Congressional purpose of assuring New York City's access to seasonal financing "in order that the city of New York may maintain essential governmental services." 31 U.S.C. § 1501(3) (Supp. V, 1975).

Accordingly, P. L. 94-236 cannot be said to operate to deny due process of law or the equal protection of the laws, and the determination of the District Court should be affirmed.

CONCLUSION

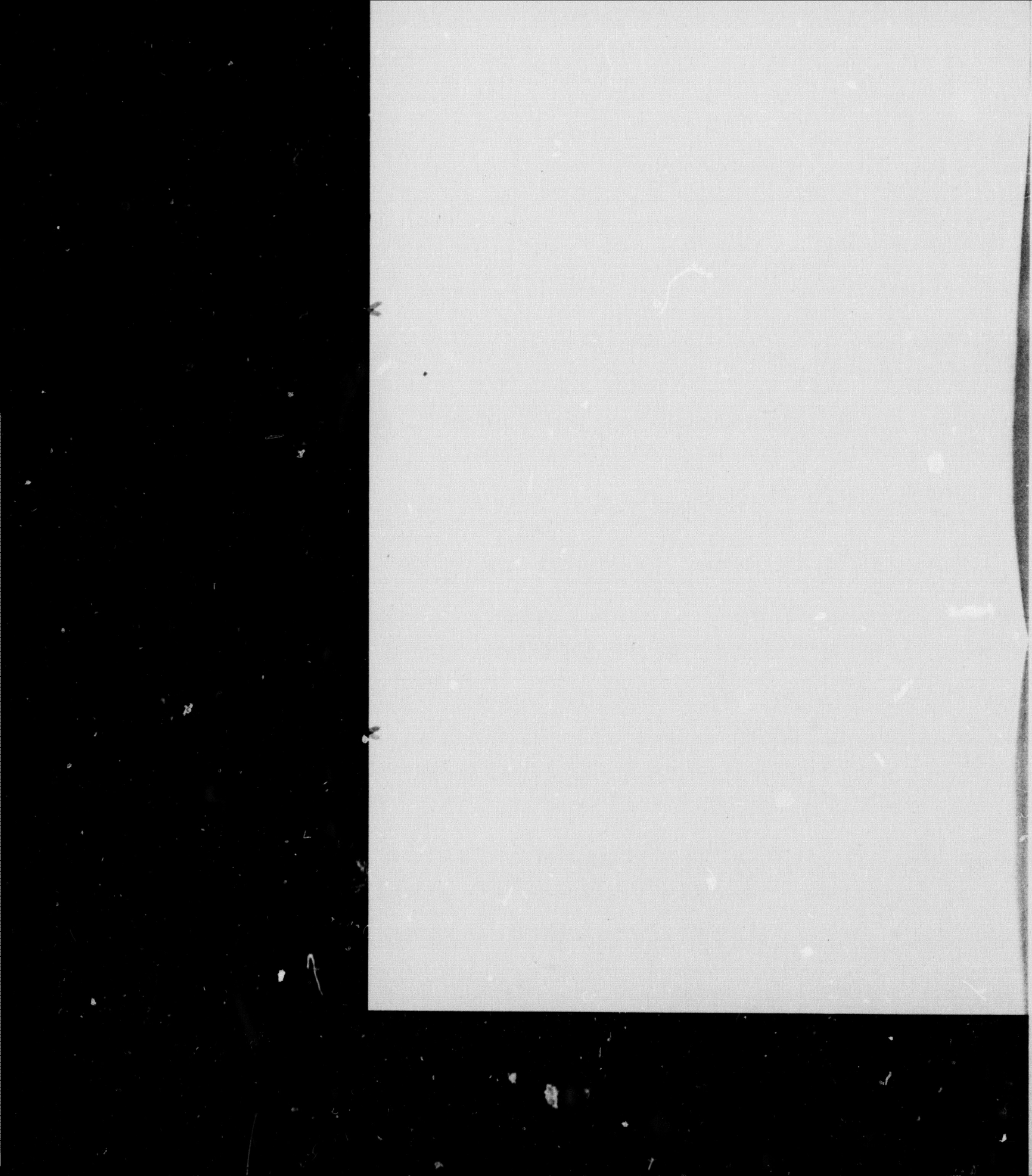
The order of the District Court dismissing the complaint as against the Federal Defendants should be affirmed in all respects.

Dated: New York, New York
October 19, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the Southern
District of New York, Attorney for
Defendants-Appellees United States of
America, Secretary of the Treasury, Com-
missioner of IRS, and Alvin D. Lurie.*

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Of Counsel.*



AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
19th day of October 1977 she served/~~copy~~ of the
within Brief of Appellees

by placing the same in a properly postpaid franked envelope addressed:

Alfred Kirshner
98 Van Cortlandt Park South
Bronx, New York 10463

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

19th day of October, 19 77

Pauline P. Troia
PAULINE P. TROIA
 Notary Public, State of New York
 No. 31-4632381
 Qualified in New York County
 Commission Expires March 30, 1978